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Oscar Peterson v. Claude Alkema : Brief of Respondents

Utah Supreme Court

Samuel C. Powell; Derrah B. Van Dyke; Attorneys for Defendants and Respondents;

Case No. 7868

IN THE SUPREME COURT
of the
STATE OF UTAH

RESPONDENTS BRIEF

OSCAR PETERSEN,

Plaintiff and Appellant

— vs. —

CLAUDE ALKEMA and MRS. CLAUDE ALKEMA, his wife,

Defendants and Respondents.

SAMUEL C. POWELL
DERRAH B. VAN DYKE
Attorneys for Defendants and Respondents

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INDEX

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

UTAH RULES OF CIVIL PROCEDURE CITED

TEXT CITED

ANNOTATIONS CITED

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STATEMENT OF FACTS

The appellant's statement of facts is substantially correct. However, there are omissions of some material facts to which we direct the Court's attention.

The appellant testified in his deposition that he had used ladders for the picking of fruit for five or six years and was familiar with different types of ladders used in connection with the picking of fruit (PD 8-9).

"Q. And how many years have you been picking apricots, fruit?

A. Well, I'll say off and on for five or six years; sometimes I'll miss a year, and put in a month or two when there wasn't nothing else to do.

Q. What kind of ladders have you been using, regular picking ladders?

A. Regular picking ladders. There's two kinds of picking ladders. One comes up to a point, and the other one is a square one on top. That is about the only two picking ladders I know about.

Q. This one comes up to a point?

A. Yes. Comes up to a point, like that (illustrating).

Q. Three legged?

A. Yes.

Q. That is the ordinary ladder used for picking, is it?

A. Yes." (PD 8-9).

On the day in question, the appellant started picking fruit about 8:00 A.M. using this ladder continuously except for a lunch period (PD 12). That during such time he picked thirty-two (32) bushels of apricots (AD 9-10). The ladder used by the appellant was in good condition. The appellant testified that the ladder was not "rickety" (PD 9), and the ladder had been used by respondent Claude Alkema the day before (AD 6), whose weight was 240 pounds (AD 6).

After the appellant quit work, respondent Claude Alkema examined the ladder and saw that it was broken in three places, on one of the side rails. The steps were not broken (AD 12). The ladder was an ordinary ladder used in the picking of fruit, being what is designated as an eight foot ladder having three legs with seven steps in it, coming to a point at the top. It was of wood construction. Under each step there was a steel rod attached to the side rails to brace the ladder and its steps (AD 6-7) (PD 12).

Appellant had been using the ladder in the picking of fruit for about six and one-half (6½) hours, except for the time he was eating lunch (PD 9) (AD 10).

Prior to appellant's injury, respondent Claude Alkema had told him to quit work (AD 10), and when he didn't quit, Alkema went down and on his way met the appellant (AD 11). Appellant told Alkema he had injured his hand (PD 13). Appellant, after asking Alkema for cold water, in response to a question from Mr. Alkema as to whether his arm hurt very bad said, "Oh I think it is just more of a bruise. It will be all right in a day or two." (AD 11). Appellant poured water upon his arm himself (PD 14). He did not ask Alkema for medical aid. A short time after the accident Alkema brought appellant to Ogden in his automobile and let him out at 24th Street and Lincoln Avenue, because the appellant said he wanted to get out there (AD 14), which place is a block away from the Milner Hotel where appellant was staying (PD 14). When appellant left Alkema's auto-

mobile, he did not ask for medical aid (AD 14). When he went to the Milner Hotel he did not ask the clerk to obtain a doctor for him (PD 14). He went out that evening to supper somewhere on 25th Street near the Milner Hotel. He purchased four bottles of beer and took the beer to his room and drank the beer during the night (PD 15-16). The following morning he went to a coffee shop and ordered a cup of coffee and then saw a policeman who took him to the Dee Hospital (PD 16). After he had been to the hospital and the doctor, he commenced to pick apricots again and worked for two or three days (PD 17). He went back to see the doctor once (PD 19).

STATEMENT OF POINTS

The points upon which respondents rely to sustain the judgment of the District Court are as follows:

Point 1—The pleadings and depositions show that there is no genuine issue as to any material fact and the facts disclosed by the pleadings and depositions bring the case squarely within the "simple tool" rule, therefore, respondents are entitled to a summary judgment as a matter of law on the first cause of action.

Point 2—The pleadings and depositions show that there is no genuine issue as to any material fact and under the facts disclosed by the pleadings and depositions no actionable negligence on the part of respondents can be found and, therefore, respondents are entitled to a summary judgment as a matter of law on the second cause of action.

ARGUMENT

In the District Court hearing it was stipulated by the parties in open Court that the deposition of the appellant and the deposition of the respondent Claude Alkema be published, read and considered by the Court. Arguments by counsel for appellant and respondents on the law were fully heard and considered by the Court. No genuine issue as to any material fact is disclosed by the pleadings and depositions and the District Court rendered summary judgment as a matter of law in favor of respondents on both causes of action. This it could do without findings under Rule 56 (c), and Rule 52 (a). Rule 52(a) provides:

> ". . . Findings of fact and conclusions of law are unnecessary on decisions of motions under rule 12 or 56 or any other motion except as provided in Rule 41 (b)."

Rule 41 (b) has no application in this case.

POINT 1

THE PLEADINGS AND DEPOSITIONS SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE FACTS DISCLOSED BY THE PLEADINGS AND DEPOSITIONS BRING THE CASE SQUARELY WITHIN THE "SIMPLE TOOL" RULE, THEREFORE, RESPONDENTS ARE ENTITLED TO A SUMMARY JUDGMENT AS A MATTER OF LAW ON THE FIRST CAUSE OF ACTION.

The appellant at the time of this accident was a mature man, being fifty-eight (58) years of age, and was of sufficient intelligence and mental capacity to appreciate

danger. He was familiar with the use of fruit picking ladders, having used them for more than five (5) years. The type of fruit picking ladder which he was using is generally and commonly used in fruit picking. It is simple in construction so the defects, if any, therein could be discovered without skill or knowledge and without intricate inspection. The appellant chose the ladder at the beginning of his work, set it up, tried it, and found that it was not "rickety." He used this ladder in picking apricots continuously for a period of six and one-half hours, with the exception of a short lunch period, moving it from tree to tree. He, of necessity, went up and down it during his picking and prior to the accident he had picked thirty-two (32) bushels of apricots. If there were any defects in the ladder they most certainly could have been discovered by the appellant in his examination and use of this ladder. The appellant was as well qualified as the respondents to detect any defects, if any, in the ladder and to judge of the probable danger of using it. The respondent Claude Alkema had used this ladder himself the day before, he being a much larger man than the appellant.

Under these facts and circumstances, it is clear that this case comes squarely within the rule of law known as the "Simple Tool" rule. The rule was recognized and applied by this court in the case of Proctor v. Town Club, Inc., 105 Utah 72, 141 Pac. 2nd 156. In that case the employer furnished the plaintiff with a stepladder for the purpose of hanging drapes. This stepladder suddenly

split and collapsed, causing the injuries complained of. This Court held that the stepladder was in the class of ordinary simple tools, applied the simple tool rule and held against the plaintiff.

The Court through Justice McDonnough quoted the rule as laid down in the case of Newbern v. Great Atlantic & Pacific Tea Co., 4 Cir., 68 F. 2d 523, 91 ALR 784, as set forth in appellant's brief at page 19 thereof.

Appellant in his brief at page 22 thereof seeks to rely upon a comment made by Justice McDonnough in the Proctor case to the effect that it may be assumed without deciding that even as to a simple tool a master who furnishes to his workmen regularly employed, such tool as an incident of his regular business, has the duty of prudently inspecting it or be liable for injuries resulting from defects which inspection would have revealed. This comment can have no application to the case at bar, because the appellant does not allege or claim that inspection would have revealed the defect, nor was the appellant a workman regularly employed, being a transient fruit picker engaged only during the portion of one day.

We call the Court's attention to paragraph 111, subdivision c of appellant's first cause of action of his complaint as shown on page 3 of his brief. In that paragraph of his complaint appellant himself alleges that the breaking of the ladder was "sudden, unusual and unexpected." In addition we again call attention to the fact that respondent, Claude Alkema had himself used the ladder

the day before and the appellant had the ladder in his possession and custody and had been using it for some six and one-half hours..

In Proctor v. Town Club, supra, this Court cited with approval the Michigan case of Nichols v. Bush 291 Mich. 473, 289 N.W. 219; and the Michigan case of Kelley v. Brown 262 Mich. 356, 247 NW 900. These Michigan cases are cited and the simple tool doctrine followed in the recent Michigan case of Rule v. Giuglio 7 N.W. 2nd 227; 145 A.L.R. 537. In that case the plaintiff was employed by defendent to paint window frames, sash and eaves of defendant's house. Part of the work was painting around the attic windows above the sun porch. Defendant furnished the plaintiff with an extension ladder consisting of two separate sections, each between 12 and 16 feet in length. Plaintiff had used the ladder in doing part of the painting of defendant's house. He was using one section in painting around the attic windows when it broke on one side at the rung. Defendant, who weighed 245 pounds, testified that he, a few days prior to the accident, had used the ladder in washing the windows of his house. The Court held in favor of the defendant, holding that the ladder was a simple tool and that the case came within the simple tool rule. The Court, at page 229 of the Northwestern Reporter, adopts the following statement of the simple tool doctrine:

> "Where the tool is simple in construction, so that defects therein can be discovered without special skill or knowledge and without intricate in-

spection, the servant is as well qualified as anyone else to detect defects and to judge of the probable danger of using such tool while defective; and, the tool being in the possession of the servant, his opportunity for inspection is better than that of the master."

This case we submit is clearly in point with the case at bar.

In the case of Olsen v. Kem Temple, Ancient Arabic Order of the Mystic Shrine (North Dakota), 43 NW (2) 385, the plaintiff was decorating the interior of a pavilion preparatory to a social function given by defendant. There was a wire running lengthwise through the center of the building from 15 to 16 feet above the floor. The defendant's ladder was used by the plaintiff. The plaintiff set the ladder under the wire and while attaching paper streamers to the wire he fell from the ladder and was injured. He had moved the ladder in putting up the streamers during the period of an hour prior to the accident. The step tipped and he fell. Plaintiff had never used the ladder prior to the morning of his injury. In the majority opinion at page 387 the court says:

> "It is the general rule that an employer is bound to use ordinary care to furnish his employees with reasonably safe and proper tools and appliances with which to work. (Citing cases and texts.)
>
> "This rule of general liability is subject to a widely recognized exception. Where the tool or appliance is simple in construction and a defect therein is discernible without special skill or

knowledge, and the employee is as well qualified as the employer to detect the defect and appraise the danger resulting therefrom, the employee may not recover damages from his employer for an injury due to such a defect that is unknown to the employer . . .

"The great weight of authority is to the effect that an ordinary portable stepladder is a simple tool or appliance within the meaning of the simple tool doctrine. (Citing cases among which is the Kelley and Nichols cases in Michigan, supra.)

"In Etel v. Grubb, 157 Wash. 311, 288 Pac. 931, the Supreme Court of Washington refused to apply the simple tool doctrine in a stepladder case. In Puza Hennecke Co. 158 Wisc. 482, 149 NW 223; the Court held that a stepladder was a place to work and declined to apply the simple tool doctrine. We agree with the majority of Courts that an ordinary portable stepladder is a simple tool or appliance and that the employee, who uses it, is usually as well qualified to detect any defect therein as is the employer who furnishes it.

"The ladder in question may have been somewhat longer than the average stepladder, but it was otherwise of usual construction and there is no intimation that the height of the ladder in any way contributed to the accident. The plaintiff was several steps from the top when he fell. He set up the ladder in the first instance and ascended and descended some eight times over a period of about an hour prior to the accident."

This case is also squarely in point. We again call the court's attention to the fact that the plaintiff was

well acquainted with fruit picking ladders and had been using the ladder for some six and one-half hours prior to the accident.

The appellant at page 20 of his brief, cites the Olsen case supra, but relies entirely upon the dissenting opinion in the case, which, of course, was not the decision of the Court.

The case of Rule v. Giuglio, supra, is reported in the American Law Reports Annotated and following the report at 145 A.L.R. 542, there is an extensive annotation on the subject entitled "Ladder as simple tool within simple tool doctrine."

At page 543 the Annotator states:

> "Under ordinary circumstances a common wooden ladder is a simple tool or appliance within the meaning of the simple tool doctrine."

Cases are then cited from 15 jurisdictions and some of them discussed. At page 549 of the annotation, the Annotator says:

> "It has been held that a stepladder is a simple tool or appliance within the simple tool doctrine."

He cites cases from a number of jurisdictions and discusses some of them.

The appellant relies upon the Washington case of Etel v. Grubb, supra, but this case is contrary to the weight of authority in the United States as shown by the Olsen case, supra, and by the A.L.R. annotation,

supra, and, of course, is also contrary to our Utah law as laid down in the Proctor v. Town Club case, supra, which recognizes and applies the simple tool rule.

The appellant at page 24 of his brief cites the Utah case of Reynolds v. American Foundry & Machine Company ..... Utah ....., 239 Pac. 2nd 209. That case is not a simple tool case. It involves an injury to the employee of an independent contractor, who was injured when a defective link separated in a chain. The chain was being used to hoist a six ton core of a transformer and the chain had not been subjected to weight proof test. The simple tool doctrine is not discussed at all and it is obvious that the case is not in point with the case at bar.

At page 23 of his brief the appellant quotes from the California case of Moran v. Zenith Oil Company 206 Pac. 2nd 679. That is not a simple tool case and hence not in point.

In any event it could have no application to this case because it speaks of a liability

> "If it is shown that the employer, licensor, or proprietor knew, or by the exercise of reasonable care should have known of the defect and has failed to effect a repair thereof or to warn the workman."

Respondent, Claude Alkema, used the ladder the day before, no defect, of course, was known to him, nor could he have discovered any by the exercise of any reasonable care, and the appellant had been using the ladder for

many hours while picking thirty-two (32) bushels of apricots.

POINT 2

THE PLEADINGS AND DEPOSITIONS SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND UNDER THE FACTS DISCLOSED BY THE PLEADINGS AND DEPOSITIONS NO ACTIONABLE NEGLIGENCE ON THE PART OF RESPONDENTS CAN BE FOUND AND, THEREFORE, RESPONDENTS ARE ENTITLED TO A SUMMARY JUDGMENT AS A MATTER OF LAW ON THE SECOND CAUSE OF ACTION.

The appellant has stated the general rule that there is no duty upon the employer to render medical care and assistance to the employee. It is stated on page 26 of his brief in the case of Szabo v. Pennsylvania R. Co. (N.J., 40 Atl. (2) 562, 563, and the opinion then states an exception to the rule. This exception only applies when the injured employee is rendered helpless so that he cannot provide for his own care. This exception to the rule is stated on page 27 of appellant's brief. The facts in this case do not come within the exception. This is substantiated by the testimony of the appellant himself in his deposition. Appellant testified that he had told the respondent, Claude Alkema, he had injured his arm and asked him for some water or something cold. That the appellant himself got some cold water and poured it upon his arm and that Alkema also did the same thing for him (PD 14). The appellant also testified that after going to the Milner Hotel he had gone to the drug store around the corner and that he had purchased some liniment and had also put cold water upon the injured part

that night (PD 14). He made no effort to get in touch with the doctor himself or to have a doctor call at the hotel, or to ask the clerk of the hotel to obtain a doctor for him (PD 14). He stated that he had purchased four bottles of beer to take to his room, in case that there was too much pain, which he drank during the night (PD 15-16).

It must be remembered that the injury did not render the appellant helpless. Alkema testified he rendered first aid treatment to him. It was only a short time after the accident that Alkema took him in his automobile to Ogden. He brought him to Ogden to a point at the corner of 24th Street and Lincoln Avenue a block away from appellant's hotel (AD 14). Appellant made no effort to get medical assistance for himself, nor did he request Alkema to obtain it for him (AD 14). He quit work at approximately 2:30 in the afternoon and upon his return to Ogden could have gone to a doctor's office that afternoon within a short time after the injury, which he failed to do. It cannot be contended, therefore, that the facts in this case come within the exception to the rule, as the appellant was not rendered helpless nor was there at anytime strict necessity nor urgent exigency. To what extent this exception to the general rule has become established in law is doubtful. We quote from 35 American Jurisprudence, paragraph 109, pages 537-8:

"LIABILITY FOR INJURY TO EMPLOYEE FOR WANT OF CARE. Inasmuch as the relationship of employer and employee does not impose upon the former a legal obligation to care for the ailing or injured employee, the employer, in the absence of special agreement or statutory requirement, may not be held liable for injury which has been suffered by the employee because of a want of medical or surgical treatment; this is true although the necessity for professional attendance or treatment has arisen by reason of conduct which renders the employer liable to the employee. Accordingly, it has been held that a railroad company may not be held liable for having failed to carry to his home an employee whose feet have been frozen by exposure while in the course of his employment. However, in some states there seems to have existed for some time a general opinion that railroads should furnish aid to injured employees, and the trend of authority seems to impose upon the employer a general duty to care for an employee who has, while engaged in performing the services of his employment, become incapable of caring for himself. When an employee has, by unforeseen accident to himself, while engaged in the line of his duty, been rendered helpless, the dictates of humanity, duty, and fair dealing demand that the employer if cognizant of the injury furnish medical assistance. Of course, this duty should rest upon the employer only in extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life or avoid further serious bodily injury. It is one which arises out of strict necessity and urgent exigency. The duty arises with the emergency, and with it expires."

CONCLUSION

It is respectfully submitted that the Summary Judgment of the District Court is correct as a matter of law and should be sustained.

Respectfully submitted,

SAMUEL C. POWELL
DERRAH B. VAN DYKE

Attorneys for Defendants and Respondents